U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEANETTE SHEPPARD and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 99-399; Submitted on the Record;
Issued November 24, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) effective May 24, 1998 on the grounds that she refused an offer of suitable work; and (2) whether the Office abused its discretion by denying appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

The Office accepted that appellant, a 34-year-old window (pool) clerk, developed an adjustment disorder in the performance of duty while at the Commerce Station and the Point Breeze Station employing establishment locations. She received compensation for temporary total disability on the periodic rolls during 1996. Throughout 1996 and into 1997 appellant's treating Board-certified psychiatrist, Dr. Eric W. Fine, reported that she remained totally disabled due to her psychiatric symptoms.

The Office scheduled appellant for a second opinion examination with Dr. Gladys S. Fenichel, a Board-certified psychiatrist, on December 12, 1996 and provided her with a statement of accepted facts, questions to be addressed and the relevant case record. By report dated December 19, 1996, Dr. Fenichel reviewed appellant's history and symptoms, examined appellant, reviewed the medical reports of record and opined that it would be beneficial for appellant to return to work, but indicated that she should return to a job elsewhere within the government to avoid the recrimination that she feared with the employing establishment.

By reports dated March 6 and May 17 and 20, 1997, Dr. Fine continued to opine that appellant remained totally disabled for any employment.

The Office determined that a conflict had arisen in medical opinion between Drs. Fine and Fenichel. It referred appellant, together with a statement of accepted facts, questions to be addressed and the complete case record, to Dr. Martin D. Plutzer, a Board-certified psychiatrist, for an impartial medical opinion to resolve the conflict.

By report dated August 8, 1997, Dr. Plutzer reviewed the records, the statement of accepted facts and appellant's factual and medical history, examined her and reported her current symptoms and opined that it would be beneficial for appellant to return to work at the employing establishment in a situation where she had more control as to where she worked, *e.g*. especially one that was less stressful and one in which she did not come into contact with people with whom she previously had difficulty. Dr. Plutzer opined that appellant continued to require psychiatric treatment on a regular basis and medication adjustment, but he opined that, by returning to work, her symptoms would improve. On November 26, 1997 Dr. Plutzer completed a work restriction evaluation indicating that appellant could work eight hours per day at a new location with more control over assignment and working conditions and with a supportive, understanding supervisor.

Appellant was contacted by a vocational rehabilitation counselor who determined that Dr. Plutzer had released her to return to work with the employing establishment in a new location. Appellant's desire to remain employed with the employing establishment was noted.

By letter dated April 3, 1998, the employing establishment provided appellant with a job offer of retail/window clerk (pool) at the Market Street Station work location for eight hours per day. This position was described as "Sells stamps, money orders, retail products to customers. May throw box mail. If working in 19145 area will case mail. Will be trained in PEDC for retail clerk." The rehabilitation job offer noted that "All assigned duties are in strict accordance with you[r] permanent medical restrictions as follows: Needs to be moved to another work location; can work eight hours a day." No contact with personnel from either the Commerce Station or the Point Breeze Station was required.

By letter dated April 9, 1998, the Office advised appellant that the employing establishment had offered her the position of retail window clerk at a new location, which was found by the Office to be suitable to her work capabilities. It advised that the position was currently available to her and that she had 30 days from the date of this letter to either accept the position or to provide an explanation of the reasons for refusing it. It further advised that if she refused the position, any reasons she put forth would be considered prior to determining whether or not her reasons for refusing the job were justified. The Office further advised appellant of the provisions of 5 U.S.C. § 8106(c)(2).

In a response dated April 22, 1998, appellant refused the offered position stating that she had appointed an attorney to advise her in these matters and had been advised by him that she had the right to have him collect all medical reports, records, information and other data related to this matter, in order that he and she might consult to ensure that her rights and interests were properly considered and protected.[1] Appellant also claimed that Dr. Fine did not advise discontinuation of psychotherapy or medication at that time. Appellant further alleged that the job did not seem suitable because a pool clerk must be worked where needed and she might possibly come into contact with one or more of the offenders involved in her claim, before,

[1] The Board notes that there is nothing in the case record formally designating this attorney as appellant's legal representative.

during or after the upcoming EEO hearings, "definitely if working in 19145 area and very possibly at the [Market Street Station]."

By letter dated April 29, 1998, the Office advised appellant that her reasons for refusing the offered position had been considered and were found to be unacceptable and advised that she had an additional 15-day period within which to accept the offer, before the Office proceeded with a final decision. The Office also advised that further reasons for refusal would not be considered.

Appellant did not accept the job offer.

By decision dated May 15, 1998, the Office terminated appellant's compensation entitlement effective May 24, 1998 finding that she had refused an offer of suitable work. The Office found that the well-rationalized report of the impartial medical examiner constituted the weight of the medical opinion evidence of record and established that appellant could return to work at the employing establishment in a new location where she would not have to interact with persons with whom she had had a history of problems. The Office found that appellant was properly notified by the Office that the offered job was suitable, that her reasons for refusal were considered and that she was notified that they were unacceptable and that she was given additional time within which to accept the position, but failed to do so. This decision was addressed to appellant at: 2337 Morris Street, Philadelphia, PA 19145, her mailing address of record and the address to which other correspondence of record received by her had been mailed.

By letter dated July 22, 1998, appellant requested an oral hearing. She alleged that her request for an oral hearing should be considered to be timely as she did not receive a copy of the May 15, 1998 decision within 30 days of its issuance. Appellant claimed that she was made aware that a final decision had been issued when she went to the Office on June 22, 1998, which she claimed was the last of four visits dating from May 18, 1998. Appellant claimed that she picked up a copy of her May 15, 1998 decision on June 23, 1998, which she alleged was back-dated 38 days.[2]

By decision dated September 11, 1998, the Branch of Hearings and Review noted that appellant was not, by right, entitled to a hearing as it was untimely requested and denied her request for an oral hearing finding that the issue could be equally well addressed by requesting reconsideration from the Office and submitting relevant evidence not previously considered which supported that her refusal was justified.

The Board finds that the Office properly terminated appellant's compensation entitlement under 5 U.S.C. § 8106(c)(2) effective May 24, 1998 on the grounds that she refused an offer of suitable work.

[2] The Board notes, however, that the typed date at the end of the memorandum to the Director was May 14, 1998.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation benefits which includes cases in which the Office terminates compensation under 5 U.S.C. § 8106(c)(2) for refusing to accept suitable work.[3]

Section 8106(c) of the Federal Employees' Compensation Act states: "a partially disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[4]

However, to justify termination under 5 U.S.C. § 8106(c)(2) the Office must show that the work offered was suitable.[5] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[6]

In this case, appellant's treating psychiatrist, Dr. Fine, opined that appellant remained totally disabled for all employment. An Office second opinion psychiatrist, Dr. Fenichel, determined that appellant would benefit from returning to work, indicating that she should return to a job elsewhere within the government to avoid the recrimination that she feared with the employing establishment. The Office properly found that a conflict in medical evidence had arisen between Drs. Fine and Fenichel, and referred appellant, together with a statement of accepted facts, the complete case record and questions to be resolved, to Dr. Plutzer, for an impartial medical examination to resolve the conflict. In a thorough and well-rationalized opinion, Dr. Plutzer concluded that appellant could return to full-time work at the employing establishment at a new location with more control as to where she worked, especially where she did not come into contact with people with whom she had previously had difficulty. Dr. Plutzer noted that appellant continued to require psychiatric treatment on a regular basis and medication adjustment, but he opined that, by returning to work, her symptoms would improve.

The Board has frequently explained that, when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, must be given special weight.[7] As Dr. Plutzer's report is well rationalized and is based upon a proper factual and medical background, it is entitled to that special weight, such that it constitutes the weight of the medical opinion evidence of record and establishes that appellant can return to work at the employing establishment at a new location in an assignment where she did not come into contact with people with whom she had previously had difficulty.

[3] *Henry P. Gilmore*, 46 ECAB 709 (1995).

[4] 5 U.S.C. § 8106(c)(2).

[5] *David P. Camacho*, 40 ECAB 267 (1988); *Harry B. Topping, Jr.* 33 ECAB 341 (1981).

[6] 20 C.F.R. § 10.124; *see also Henry P. Gilmore, supra* note 3; *Fred J. Nelly*, 46 ECAB 142 (1994).

[7] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

Subsequent medical reports from Dr. Fine restate his previous opinion as to appellant's total disability status and are insufficient to outweigh or create a conflict with the report of Dr. Plutzer, as Dr. Fine was on one side of the conflict resolved by Dr. Plutzer.[8]

The employing establishment then offered appellant a position at a new work location away from the people she had previously worked with, as a retail/window clerk (pool); a position which conformed with her medical restrictions. The Office properly found that the offered position was suitable for appellant and in accordance with the limitations specified by Dr. Plutzer. Appellant was properly informed of the consequences of refusal to accept such employment.

Thereafter the burden shifted to appellant to prove that her reasons for refusal were justified. Appellant's allegation that she needed to consult with an attorney is not a reason not to accept an offer of suitable employment. Her relationship with her attorney who is not her designated representative in this case is completely independent of her obligation to the Office to accept suitable employment when it is offered. Therefore, this reason does not justify refusal of the job offer.

Appellant's argument that she continued to require psychiatric medication and treatment is also not an acceptable reason for refusal to accept suitable work, as Dr. Plutzer had noted her continuing need for treatment and medication. However, Dr. Plutzer found that appellant's need for continuing medical treatment was not a contraindication to appellant's return to work.

Finally, appellant's argument that a pool clerk must be worked where needed and she might possibly come into contact with one or more of the offenders involved in her claim, before, during or after the upcoming EEO hearings, "definitely if working in 19145 area and very possibly at the [Market Street Station]," is insufficient to support her refusal of the position. The Office properly determined that appellant's rehabilitation job offer was limited to the Market Street duty station and did not involve contact with the Commerce Station or the Point Breeze Station or their personnel and did not involve appellant being moved to another work location other than Market Street. The Office properly determined that appellant had not shown that she could reasonably expect to encounter any personnel from the other stations of the employing establishment. Therefore, the Board finds that this does not constitute a justifiable reason for refusal of the offered position. As appellant proffered no justifiable reasons for refusal of the suitable rehabilitation job offer, the Office properly notified her of this fact and appropriately extended her an additional 15 days within which to accept the offered position. She, however, declined to accept the offered position. The Office properly terminated appellant's monetary compensation entitlement, finding that she had refused an offer of suitable work.

The Board further finds that the Office properly denied appellant's request for an oral hearing under 5 U.S.C. § 8124(b)(1).

[8] *Dorothy Sidwell*, 41 ECAB 857 (1990).

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[9]

The Office's procedures implementing this section of the Act are found in the Code of Federal Regulations at 20 C.F.R. § 10.131(a). This paragraph, which concerns the preliminary review of a case by an Office hearing representative to determine whether the hearing request is timely and whether the case is in posture for a hearing, states in pertinent part as follows:

> "A claimant is not entitled to an oral hearing if the request is not made within 30 days of the date of issuance of the decision as determined by the postmark of the request, or if a request for reconsideration of the decision is made pursuant to 5 U.S.C. § 8128(a) and § 10.138(b) of this subpart prior to requesting a hearing, or if review of the written record as provided by paragraph (b) of the section has been obtained."[10]

The Board has held that the Office, in its broad discretionary authority in the administration of the Act, has the power to hold hearings in certain circumstances where no legal provision was made of such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[11] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[12]

In the present case, the Office issued its decision terminating appellant's compensation on May 15, 1998. Appellant requested a hearing by letter dated July 22, 1998. A hearing request must be made within 30 days of the issuance of the decision as determined by the postmark of the request.[13] Since appellant did not request a hearing within 30 days of the Office's May 15, 1998 decision, she was not entitled to a hearing under section 8124 as a matter of right.

The Office, in its discretion, considered appellant's hearing request in its September 11, 1998 and denied the request on the basis that appellant could pursue her claim by requesting reconsideration and submitting additional evidence supporting that the position that she refused was not suitable to her present emotional condition.

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[9] 5 U.S.C. § 8124(b)(1)

[10] 20 C.F.R. § 10.131(a).

[11] *Johnny S. Henderson*, 34 ECAB 216,219 (1982).

[12] *See Herbert C. Holley*, 33 ECAB 110 (1981).

[13] 20 C.F.R. § 10.131(a).

As the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts.[14] There is no evidence in the case record to establish that the Office abused its discretion in refusing to grant appellant's hearing request.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated September 11 and May 15, 1998 are hereby affirmed.

Dated, Washington, D.C.
November 24, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[14] *Daniel J. Perea*, 42 ECAB 214 (1990).